No. 14,750

IN THE

United States Court of Appeals

For the Ninth Circuit

PHYLLIS BAEKGAARD, formerly Phyllis Irene Carreiro,

Appellant,

vs.

GENEE M. CARREIRO, IRENE G. CARREIRO, Individually and as Administratrix of the Estate of George S. Carreiro, Deceased, and WELLS FARGO BANK & UNION TRUST COMPANY,

Appellees.

APPELLANT'S OPENING BRIEF.

ALFRED JAMES SMITH,
110 Sutter Street, San Francisco 4, California,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTION.

This action arose out of conflicting claims to the proceeds of three insurance policies in the total face amount of $25,000.00 issued by New England Mutual Life Insurance Company on the life of George S. Carreiro, deceased.

The action was originally filed by New England Mutual Life Insurance Company, a Massachusetts corporation, as an action in interpleader under Sec-

tion 1335 of Title 28 United States Code (3-22).[1] Genee M. Carreiro, the first and divorced wife of the assured (a citizen of California), Irene G. Carreiro, his second wife (a citizen of California), and Phyllis Baekgaard, his daughter (a citizen of Illinois), were named as defendants and the proceeds of the three policies were deposited in court. Subsequently, Wells Fargo Bank & Union Trust Company (a California corporation) was allowed to intervene as the executor of the last will and testament of the assured (37-41).

The jurisdiction of this court is based upon Section 1291 of Title 28 United States Code.

A fourth policy in the face amount of $5,000.00 issued by Prudential Life Insurance Company is mentioned in findings XII and XIII (52). That policy is the subject of a separate action (filed after entry of the judgment in this action) which is now on appeal before this court (No. 14,878). Further proceedings in that action were stayed by order of this court pending determination of this appeal.

STATEMENT OF THE CASE.

At the death of George Carreiro (January 2, 1954), all of the policies designated Genee Carreiro (described in the policies as "Goldie M. Carreiro, wife of the Insured"), as the primary beneficiary. In the event of her death before that of the assured, his

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[1]All references are to pages of the transcript.

daughter Phyllis was designated as the secondary beneficiary.

George and Genee were no longer married, however, at the time of his death. An interlocutory judgment of divorce had been granted Genee on August 21, 1951, followed by a final decree on August 22, 1952.

On August 7, 1951 (two weeks before the interlocutory judgment of divorce) they had entered into a property settlement agreement which provided in part as follows:

> "Sixth: The property of the parties hereto shall be divided by said parties as follows:
>
> * * * * * * *
>
> "7. The husband shall receive and be entitled to the insurance policies hereinafter listed, free and clear of any claims of the wife thereto.
>
> "Policy No. 820167 in the sum of $10,000.00, New England Mutual Life Insurance Company.
>
> "Policy No. 842502 in the sum of $15,000.00, New England Mutual Life Insurance Company.
>
> "Policy No. 725936 in the sum of $5,000.00, New England Mutual Life Insurance Company.
>
> "Policy No. 725937 in the sum of $5,000.00, New England Mutual Life Insurance Company.
>
> "Policy No. 1154064 in the sum of $15,000.00, New England Mutual Life Insurance Company.
>
> "Policy No. 5243932 in the sum of $5,000.00, Prudential Insurance Company of America."
>
> (142-4)

Before his death, George Carreiro surrendered two of the six policies (the first and the second). The

remaining four are the policies involved in this action and in the action filed by Prudential Insurance Company of America.

The agreement adjusted and settled all of the property rights of the parties including "any and all community rights, property rights, right to support and maintenance, and other matters" (140). Its comprehensive provisions which are printed at pages 139-146 of the transcript need not be quoted in this brief except for one other clause which provided as follows:

> "Fourth: That said parties hereto each hereby waive any and all right to the estate of the other left at his or her death and forever quitclaim any and all right to share in the same of the other, by the laws of succession, and said parties hereby release one to the other all right to be administrator or administratrix or executor or executrix of the estate of the other, and hereby release and waive all right to inherit under any will of the other, and each of the said parties hereby waive any and all right of homestead in the real property of the other, probate or otherwise, and said parties hereby waive any and all right to the estate or any interest in the estate of the other for family allowance by way of inheritance, and from the date of this agreement to the end of the world said waiver of the other in the estate of the other party shall from the date of this agreement be effective and they shall have all the rights of single persons and maintain the same relation of such toward each other." (141-2).

After its execution, George Carreiro forwarded a copy of the agreement to New England Mutual Life

Insurance Company. On September 6, 1951, the company sent him the following letter:

"September 6, 1951.

"Dr. George S. Carreiro,
490 Post Street
San Francisco, California

"Re: Policies No. 725936-7, 820167,
842502 and 1154064

"Dear Dr. Carreiro:

"We wish to thank you for forwarding to us a certified copy of the property settlement agreement between you and Mrs. Carreiro. The agreement has been attached to the permanent records at the Home Office, and we can now consider that Mrs. Carreiro has no further community property interest in these policies.

"If you wish to make any changes in the beneficiary arrangement please advise and forms will be prepared for your signature. We note that we are holding all of your policies with the exception of Policy No. 842502 which is presently assigned to the bank.

"Yours sincerely,

"Assistant Cashier."

(54)

Although George Carreiro thereafter had occasion to go to the office of the company in connection with the two policies which he surrendered, he took no other step to change the beneficiary of the three policies involved in this action (or of the Prudential policy) (69-71).

In an attempt to show to whom George Carreiro intended that the proceeds of the policies should go,

a number of witnesses were called by the various claimants to testify to conversations which they had had with him. The trial court refused, however, to believe any of their testimony and expressly found that none of it was "creditable" (56, finding XXV). For that reason and because of that finding, none of that testimony is relied upon by us as a basis for the reversal of the judgment. Some of it was included in the printed transcript but not at our request.

The trial judge divided the proceeds of the policies equally between the four claimants (Genee Carreiro, Irene Carreiro, Phyllis Baekgaard and Wells Fargo Bank & Union Trust Company, as executor of George Carreiro's estate). This was not done on the basis of findings that each was *entitled* to 25% of the proceeds but pursuant to a stipulation entered into by *three* of the claimants (Genee Carreiro, Irene Carreiro and Wells Fargo Bank). Phyllis Baekgaard refused to enter into that stipulation and chose instead to take this appeal.

Her position is as follows:

Under the law of California, which is admittedly applicable to the case, Genee Carreiro relinquished all of her claims under the policies by entering into the property settlement agreement, including whatever claims or expectancies she may have had as a beneficiary thereunder. The relinquishment was completed upon the execution of the agreement and there was no need thereafter for any notice to the insurance company or for the execution of any formal change of beneficiary.

As a result of that relinquishment, appellant, as the secondary beneficiary under the policies, became entitled to their proceeds in preference to the estate of the assured (represented by the Wells Fargo Bank).

Under no conceivable theory, is Irene Carreiro (the second wife of the assured whom he married on December 20, 1952) entitled to any of the proceeds. She is not designated as a beneficiary. No basis for her claim is suggested in her answer and cross-complaint (34-36). In fact, after Wells Fargo Bank intervened in the action, she admitted that the bank was entitled to the proceeds as executor of George Carreiro's estate (paragraph I of her answer to the pleading in intervention (48) admits each and every allegation of that pleading, including paragraph IX (41) in which the bank asserts its claim to the proceeds).

SPECIFICATION OF ERRORS.

Although a more detailed specification of errors was originally filed in this court (150), there is actually only one all-comprehensive error in the case: under the applicable California law, the proceeds of the policies were payable to appellant. The trial court erred in not making them payable to her.

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ARGUMENT.

(1) GENEE CARREIRO RELINQUISHED ALL HER CLAIMS OR EXPECTANCIES AS A BENEFICIARY UNDER THE POLICIES BY ENTERING INTO THE PROPERTY SETTLEMENT AGREEMENT AND THERE WAS NO NEED THEREAFTER FOR ANY NOTICE TO THE INSURANCE COMPANY OR FOR THE EXECUTION OF ANY FORMAL CHANGE OF BENEFICIARY.

The California cases on the subject are clear.

The beneficiary under a policy of insurance subject to change by the assured, like the beneficiary under a will, has a mere expectancy dependent upon designation at the time of the assured's death.

The parties to a property settlement agreement *can* agree to the relinquishment of such an expectancy provided that the agreement be clear and that nothing be left to implication.

The latest and leading California case is *Thorp v. Randazzo,* 41 Cal. 2d 770, 246 P. 2d 38, decided in 1953 by the Supreme Court of California. The facts in that case were as follows:

The plaintiff entered into a property settlement agreement with her husband under the terms of which she waived all claims to two life insurance policies (of which she was the beneficiary) upon his life. Following their divorce, the husband changed the beneficiary of one of the policies but made no change as to the other. After his death, the wife filed an action for declaratory relief to determine her rights under that policy claiming to be entitled to its proceeds as the beneficiary thereof.

It should be noted that, contemporaneously with the execution of the property settlement agreement,

the wife had signed a printed change of beneficiary form pertaining to that policy. Although he survived for approximately seven years, however, the husband had failed to send the form to the insurance company. In other words, the case was much more favorable to the divorced wife on its facts than this case is. Unlike Genee Carreiro in this case, the plaintiff in *Thorp v. Randazzo* was in a position to contend that, by requesting her to sign and then not sending the form to the company, her husband had *expressed* the intention to continue her as the beneficiary of the policy.

The court nevertheless held that the wife was not entitled to the proceeds of the policy. The opinion is so clearly in point that we quote from it at length in an appendix to this brief. Let it merely be emphasized here that *it is by and because of the property settlement agreement that the wife was held to have waived her claim or expectancy as the beneficiary under the policy and that no further action was needed on the part of her former husband to make the change complete.*

In *Thorp v. Randazzo,* supra, as in this case, the insurance company had paid the proceeds of the policy into court so that no question could be raised as to whether *its* requirements for a change of beneficiary had been complied with. Whatever may be the law in a case in which the insurance company is still an active party to the action and claims that its requirements for a change of beneficiary have not been complied with, it is settled that those require-

ments cease to be material in a case in which the proceeds have been paid into court and litigation is exclusively between adverse claimants to the proceeds (See the cases cited in the annotation entitled *"Insurance Beneficiary—Change—Manner"*, 19 A.L.R. 2d 5, 108-109).

Under the rule of the *Thorp* case, the expectancy of a beneficiary under a life insurance policy must be held to have been waived if it appears to have been brought to his or her attention and if his or her intention to disclaim future rights which might develop from such an expectancy is made clear in the property settlement agreement.

It is apparent that Genee Carreiro's expectancies under the policies were brought to her attention (since the agreement specifically mentioned the policies). Her intention to disclaim future rights which might develop from those expectancies was made clear by her waiver of "any claims" to the policies (143).

Moreover, the agreement covered *all* of the property of the parties. Hence, by accepting the provisions for her benefit, Genee Carreiro must be held to have released her husband with respect to *all* other property. Finally, it must be emphasized that she also expressly waived all her rights to his estate either under the laws of succession or under a will as well as all her rights to a probate homestead and to a family allowance (141-2). In other words, she waived *all* of the possible expectancies which she might have upon his death.

Since Genee Carreiro gave up her expectancies as a beneficiary under the policies by the execution of the agreement, it is completely immaterial, as far as she is concerned, that George Carreiro did not execute a formal change of beneficiary. Nor is it material that, after he had forwarded the agreement to the insurance company, the company wrote to him that it considered that Mrs. Carreiro (Genee) had no further community property interest in the policies. What the company considered her rights to be has no bearing on the question of what her rights in fact were.

Finally, it is similarly immaterial that the company also wrote to George Carreiro that, if he wished to make any changes of beneficiaries, forms would be prepared for his signature.

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(2) AS A RESULT OF THE WAIVER OF HER EXPECTANCY BY GENEE CARREIRO, APPELLANT, AS THE SECONDARY BENEFICIARY UNDER THE POLICIES, BECAME ENTITLED TO THEIR PROCEEDS IN PREFERENCE TO THE ESTATE OF THE ASSURED.

It is apparent from Conclusion of Law I (57) that the basis of the trial court's decision (that appellant was not entitled to the proceeds of the policies) was that the condition precedent to the payment of the proceeds to her, namely, the death of the primary beneficiary, had not been fulfilled.

Under the law of California, however, it was not necessary for that condition to be fulfilled for appellant to become entitled to the proceeds.

The leading case on that point is *Beck v. West Coast Life Ins. Co.,* 38 Cal. 2d 643, 241 P. 2d 544. The policy in that case was payable to the husband of the assured as primary beneficiary and, in the event that he did not survive her, to an alternative beneficiary. The primary beneficiary murdered the assured and was convicted of the crime. Since he thereby forfeited his rights under the policy, the question arose as to whether the alternative beneficiary or the executor of the estate of the assured was entitled to the proceeds.

It was contended on behalf of the executor, as it was contended in this case, that, the primary beneficiary not having predeceased the assured, the condition precedent to the payment of the proceeds to the alternative beneficiary had not occurred and she accordingly was not entitled thereto.

The court held, however, that the proceeds should be paid to her since, by selecting her as an alternative beneficiary, the assured had expressed a preference for her as against the executor of her estate. Although the beneficiary clause of the policy could not be given full effect (since, under the law, the murderer was not entitled to the proceeds), it was given effect as far as possible.

Similarly, in this case, the beneficiary clause of the policies should have been given effect as far as possible. This could be done only by holding that appellant was entitled to the proceeds since the agreement precluded Genee Carreiro from receiving them and the assured had clearly expressed the intention

that any interest that his estate might have in the proceeds should be subordinate to that of appellant.

CONCLUSION.

Genee Carreiro waived her rights. Irene Carreiro has no rights other than through her husband's estate. The estate itself would be entitled to the proceeds only if appellant had predeceased her father.

It follows that the trial court should have awarded the proceeds to appellant and that its judgment holding that she is entitled to only 25% thereof should be reversed.

Dated, San Francisco, California,
January 25, 1956.

Respectfully submitted,
ALFRED JAMES SMITH,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

THORP v. RANDAZZO, 41 CAL. 2d 770, 773-776.

Plaintiff makes no claim to the insurance proceeds by reason of her former marital relationship with the deceased or contrary to her waiver of all community interest in the policy, but rather she relies on her distinct status as the named beneficiary on the policy at the time of deceased's death (*Shaw v. Board of Administration,* 109 Cal. App. 2d 770, 774, 241 P. 2d 635). The position of a beneficiary named in an insurance policy subject to change by the insured is similar to that of a beneficiary of a will, a mere expectancy dependent on designation at the time of the insured's death (*Grimm v. Grimm,* 26 Cal. 2d 173, 176, 157 P. 2d 841). Where a property settlement agreement covers *all* of the property of the parties and the wife, in accepting certain provisions for her benefit, fully releases the husband with respect to all other property, such release ordinarily would cover and include her interest as the designated beneficiary on an insurance policy; but where the language is not broad enough to encompass such an expectancy or an intent appears to exclude such rights as a present part of the settlement, the wife may still take as beneficiary if the policy so provides (*Miller v. Miller,* 94 Cal. App. 2d 785, 789, 211 P. 2d 357). In interpreting property settlement agreements, courts weigh carefully the language employed by the parties in measure of the renunciation of their respective rights. To this end, it is the settled rule that "general expressions

or clauses in such agreements are not to be construed as including an assignment or renunciation of expectancies and that a beneficiary therefore retains his status under an insurance policy or under a will if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take property under a will or an insurance contract of the other." (*Grimm v. Grimm,* supra, p. 176.) The failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he does not wish to effect such a change (*Shaw v. Board of Administration,* supra, p. 776; also *Estate of Crane,* 6 Cal. 2d 218, 221, 57 P. 2d 476, 104 A.L.R. 1101), but each case must be decided upon its own facts (*Miller v. Miller,* supra, p. 790).

The property settlement agreement here is quite comprehensive and establishes that a complete and final settlement was intended. No question is raised as to the fairness of its provisions or the consideration therefor. The agreement, in addition to specific mention of the insurance policy in question, with express recital of plaintiff's waiver of "all claims to any benefits that she may have at present, or which may hereafter be derived" therefrom and her agreement to execute the papers necessary to effect such release of interest in the policy, further provides: "The said parties hereto each hereby waive any right and all right to the estate of the other left at his or her death and forever quitclaim any and all right to share in the same of the other, by laws of succes-

sion, and said parties hereby release one to the other all right to be the administrator or administratrix or executor or executrix of the estate or will of the other, * * * and from the date of this agreement hereafter said waiver of the other in the estate of the other shall be effective and they shall have the right of single persons and maintain the same relation of such toward each other * * * this agreement is a full and final settlement between said parties and each party hereto has had independent legal advice'' thereon.

This language is almost identical with that used in *Sullivan v. Union Oil Co.,* 16 Cal. 2d 229, 105 P. 2d 922, wherein it was held that the property settlement agreement not only terminated the wife's community interest in a certain benefit fund maintained by the husband's employer, but also any rights which she may have had as a named beneficiary in connection with such fund. Practically the same language was construed in *Meherin v. Meherin,* 99 Cal. App. 2d 596, 222 P. 2d 305, to effect a like release of the proceeds of an insurance policy, which the wife claimed by reason of her continuing designation as beneficiary at the time of her husband's death. As in those cases, plaintiff here of her own free will, with full knowledge of the existence of the policy and of all pertinent facts, acting under independent legal advice, and for full and valuable consideration, expressly agreed with deceased ''to forever settle and divide between them *all* their respective properties including that of the community, to waive any right of succession or inheritance with respect to his remaining property and to

release him from any and all obligation to her which theretofore may have had existence for any reason whatsoever." (*Sullivan v. Union Oil Co.,* supra, page 237.)

Plaintiff relies on *Grimm v. Grimm,* supra, 26 Cal. 2d 173. There the property settlement agreement between the spouses gave the husband the right to change the beneficiary on his insurance policy and the wife agreed to execute any document or instrument necessary therefor. He died without undertaking to make such a change. It was held that there was no immediate release of the wife's interest as such beneficiary, that the agreement left it to the husband to decide in the future whether or not he desired to change the beneficiary, and that not having done so the wife was entitled to receive his bounty to that extent. Moreover, since the wife in the Grimm agreement waived all rights of inheritance in her husband's estate "except * * * as may be provided in any will and/or codicil * * * in effect at the date of his death," it was concluded that it was "the intention of the spouses to exclude from the agreement rights that might accrue to [the wife] at the death of the husband as a result of his bounty" (p. 179). The court then observed the distinction in the parties' agreement in *Sullivan v. Union Oil Co.,* supra, 16 Cal. 2d 229, where the language indicated a "present" not a possible future "renunciation by the husband of the wife as beneficiary." (*Grimm v. Grimm,* supra, p. 180; in accord *Meherin v. Meherin,* supra, 99 Cal. App. 2d 596, 598).

Expectancies under a will or an insurance policy may be regarded as waived only when it appears that the attention of the parties was directed to such expectancies and their intention to disclaim future rights which might develop from such expectancies is made clear in their property settlement agreement (*Estate of Crane,* supra, 6 Cal. 2d 218, 221; *Grimm v. Grimm,* supra, 26 Cal. 2d 173, 177). But in the present case specific reference was made in the agreement to the insurance policy, and plaintiff expressly waived all claim to "any benefits that she may have at present, or which may hereafter be derived from" such policy. This language clearly indicates that the parties' attention had been directed to the expectancy of the insurance proceeds, and that it was intended that plaintiff waive all interest therein, present and future. Thus, "the parties agreed that no rights were to accrue to her, even though she remained the beneficiary at the time of the husband's death." (*Grimm v. Grimm,* supra, p. 175.) In short, as in *Sullivan v. Union Oil Co.,* supra, 16 Cal. 2d 229, 237, plaintiff agreed to a *present* divestment of all claims that she might otherwise have in the insurance policy.